No. 6442

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN LIFE INSURANCE COMPANY
(a corporation),

Appellant,

vs.

EMMA C. KING,

Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Page

Statement of the case 1

Specification of errors relied upon and of errors in the decree 10

Argument 14

The learned district court erred in making its findings and rendering its judgment against the plaintiff and in favor of the defendant and in failing to decree and establish the invalidity of the policy of insurance, because, first, it was obtained by a fraudulent misrepresentation, and, second, it was void for breach of express warranty broken in its inception; and, the court further erred in refusing to adopt findings proposed by plaintiff 14

The court erred in permitting the witness, Dr. Paul Wright, to testify upon cross-examination that he had changed his opinion as to the original diagnosis of peptic ulcer, because upon post-mortem examination he had found no indication that peptic ulcer had ever existed.. 23

The court erred in permitting Dr. Charles Pius to testify on behalf of the defendant that in his opinion the condition of the stomach and duodenum were entirely unrelated to the cause of death 25

Conclusion 25

Table of Authorities Cited

	Pages
Civil Code 2561	18
Civil Code 2562	18
Civil Code 2563	18
Civil Code 2565	18, 24
Civil Code 2577	18
Civil Code 2579	19
Civil Code 2583	19
Civil Code 2607	18, 21
Civil Code 2610	18
Civil Code 2612	18, 21
Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631	19
Jeffries v. The Economical Mutual Life Insurance Company, reported in 89 U. S. 47	22
Layton v. New York Life Ins. Co., 55 Cal. App. 205	19
McEwen v. New York Life Ins. Co., 23 Cal. App. 699	19, 24
Porter v. General Acc. etc. Assur. Corp., 30 Cal. App. 204	20
Priestly v. Provident Sav. Co., 112 Fed. 271	20
Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734	20
Whitney v. West Coast Life Ins. Co., 177 Cal. 74	19, 20

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STATEMENT OF THE CASE.

This is an action brought in equity by the Northern Life Insurance Company against Emma C. King, individually, and as executrix of the will of Frank Mathew Kasshafer, deceased.

The action was brought to obtain an order decreeing that a certain policy of insurance, issued upon the life of said decedent by the plaintiff herein, was null and void because of the breach of various warranties and the fraudulent inducement of the contract by reason of false statements made by the decedent in his application and to the examining physician.

The policy contained a provision that the same should be incontestable two years after the date of its issuance. It was delivered on September 25, 1928, and

the insured died on February 25, 1930. No action having been brought by the beneficiary, the plaintiff herein filed this bill in equity in order to prevent loss of its rights by the lapse of time. The case was tried and the learned District Court entered a decree that plaintiff take nothing and ordered judgment in favor of the defendant, who was the beneficiary under the policy, in the sum of seventy-five hundred ($7500.00) dollars.

In the main, the contract of insurance in question is the usual one and contains a clause to the effect that the policy and the application therefor, a copy of which is attached to the policy, constitute the entire contract between the parties, and that no statement made by the insured should avoid the policy or be used in defense against any claim unless contained in the written application. Further, that all statements made by the insured should, in the absence of fraud, be considered representations and not warranties.

The bill alleges decedent applied for insurance on the 17th of August, 1928, the particular policy applied for being one whereunder there should be issued a contract insuring the life of the applicant in the sum of twenty-five hundred dollars, and providing that twenty-five hundred dollars more should be paid in the event that death was accidental, and that a third twenty-five hundred dollars should be paid if death occurred by reason of an automobile accident.

It is further alleged that the policy of life insurance so applied for was duly issued and delivered to the decedent pursuant to his application and examination

and a copy of the policy so issued was attached to the bill by way of exhibit, being Exhibit A thereto, and by the answer admitted to be correct. A copy of the application, a photostatic copy of which was annexed to the policy, was likewise attached to the bill herein, as Exhibit B, and it appears in the Transcript between pages 8 to 13. The correctness of both the copies of the policy and application are admitted in the answer.

The bill further alleges that after making the application the decedent went before one Dr. Paul Wright for examination touching his health and physical condition as such applicant for insurance, and that at such examination of insured certain questions appearing on the printed form were put to and answered by him, the answers being put down in writing and the applicant making a written declaration over his signature to the effect that the answers which he had so made and which had been so written, were true and correct. The document referred to was attached to the bill as Exhibit C and admitted to be correct by the answer. A photostatic copy thereof appears in the Transcript between pages 8 and 13, Exhibit B and Exhibit C forming, in reality, a single document, the first part consisting of the application and the second part of the medical examiner's report, containing the answers of the applicant to the questions asked.

It is further alleged that in reliance upon the application and the report, the policy was issued and delivered to the decedent on or about September 25, 1928, at which time the decedent receipted therefor.

The bill alleges that in the issuance of the policy and in the delivery thereof, the plaintiff relied upon the truth of the statements made in said Exhibit C, and had it known that the same were not true, as in the bill alleged, would not have issued or delivered the policy.

As to the particulars wherein it is claimed by plaintiff that the statements contained in the application were untrue, the bill sets out that the applicant, with intent to cheat and deceive plaintiff into the issuance of the policy, stated in his application for insurance that although he had previously suffered from peptic ulcer, he had recovered therefrom; that the duration of the illness had been only three weeks; that it had been moderate; that, in respect of the illness, or any other illness, he had not consulted any physician within three years next prior to the application, save that he had consulted Dr. Paul Wright in March of 1925 in respect of the peptic ulcer infection; whereas, in truth and in fact, so the bill alleges, the applicant had not ever recovered from the peptic ulcer illness, the duration thereof had exceeded three weeks, and the illness had been severe; and, in addition to all this, the applicant had actually consulted another physician in respect of the same illness, that is the peptic ulcer affliction, in November of 1927, within nine months of his application for insurance, and again in September of 1928, intermediate the application and the delivery of the policy, at both of which times he had received treatments from such physician. The application, instead of disclosing said facts, concealed the same from the plaintiff, thereby fraudulently inducing

the issuance of the policy and breaching the warranties embodied in his answers, which he, by his contract, warranted to be true.

It was further alleged in the bill that death occurred to the insured upon the 25th day of February, 1930, and that on the 27th of April, 1930, the plaintiff learned of the falsity of said representations and warranties and thereupon tendered to Emma C. King, as the executrix of the estate of the deceased, whom it may be said is likewise beneficiary under the policy, all premiums theretofore paid by the insured, and rescinded the contract of insurance.

All allegations of the bill touching upon fraud or breach of warranty were put in issue by the answer and in addition to her answer the defendant filed a cross-complaint seeking recovery under the policy of the sum of seventy-five hundred ($7500.00) dollars.

At the trial Dr. Paul Wright was a witness and testified (Transcript pages 32 to 38) that he acted as the examining physician of the plaintiff when Mr. Kasshafer applied for life insurance, conducting the examination on August 18, 1928; that he had treated Mr. Kasshafer for peptic or duodenal ulcer, that being his diagnosis, the treatment being in 1925; that the symptoms presented from which he made his diagnosis were hemorrhage, by vomiting once, distress in the intestine and hemorrhage showing in passages from the bowels; that he was called March 21, 1925, and hospitalized Mr. Kasshafer the same day, where he remained three days, when he went to his home; that Mr. Kasshafer had another hemorrhage from the bowels on the 25th so the physician rehospitalized

him, keeping him there until the 6th of April, following which the treatment was continued until June 23rd.

He further testified that Mr. Kasshafer, at the time of his examination, August 18, 1928, did not tell the examining physician that he had also consulted Dr. Hess, of San Francisco, approximately nine months prior to the examination and application or that he had taken treatment from Dr. Hess at about that time.

Dr. Hess was called and testified (Transcript pages 38 to 42) that on November 7, 1927, Mr. Kasshafer consulted him at his office in the Flood Building in San Francisco, as a patient and received treatment; that he gave a history of having had ulcers of the duodenum with a severe hemorrhage three years before the consultation; that he was at the time of the consultation suffering digestive disturbances and was afraid he might have a recurrence of the hemorrhage and ulcer; that he did not give the details of the treatment he had previously had for the ulcers, but did tell Dr. Hess that the symptoms were a hemorrhage and that there had been a diagnosis of ulcer of the duodenum, for which he received treatment.

He further stated to Dr. Hess that his reason for calling upon him was precautionary to prevent further trouble. He was given the usual physical and chemical examination but had no active disturbance at that time, although he had gas and indigestion. He was worried about his condition. He was given other examinations not connected with the question of ulcer, although the examinations were somewhat

superficial due to the fact that the patient gave a definite history of duodenal ulcer, and the physician took his word for that.

Dr. Hess prescribed a diet and medicine, the medicine being principally for the purpose of correcting hyperacidity, which precedes ulcer and is a cause of it. He was in the doctor's office several times over a course of several days.

The diet was one designed to be free of irritants, having no coarse foods or irritating things in it. Dr. Hess stated that a patient for peptic ulcer infections should keep on such a diet for a lifetime, and he supposed that he told Mr. Kasshafer that. The diet was a detailed diet and he told Mr. Kasshafer to remain on that diet permanently, giving it to him in detail so that he could keep right on it steadily.

The patient took considerable medicine away with him, and then came back the next year for more. He next visited Dr. Hess on September 11, 1928, the only symptom marked down at that time being gas. He stated he had been quite well during the year and came back for more medicine, which he believed had been successful. He asked for more of the same medicine, was given an additional supply and instructed to remain on the diet.

Upon cross-examination Dr. Hess said he was prompted to give both the tablets and the diet from the history the patient gave him and not from anything found in the examination; the history being the ulcer occurring three years before. Further, that Mr. Kasshafer looked well when he came down the second

time, and in fact was very well and was told to continue the treatment.

Mr. Bamford, assistant to the president of the Northern Life Insurance Company for twenty years prior to his testimony, and a member of the risk committee, whose duty it was to pass upon the acceptability of applicants for insurance, testified (Transcript pages 42 to 46) that in the *Kasshafer* case the Company had acted upon the application of Mr. Kasshafer, and that if the Company had known that in November of 1927 Mr. Kasshafer had consulted Dr. Hess, as a physician, and been treated by him as a patient, it would not have issued the policy without further examination or report upon the application, and that had it known that Mr. Kasshafer returned to Dr. Hess intermediate the application and the delivery of the policy, it would not have delivered the policy to him; that the Company relied upon the application made in considering the risk and in issuing the policy; that if Dr. Hess' name had been given as having been consulted by Kasshafer the Company would perhaps have followed it up to some extent; that the history of peptic ulcer in the application placed it very much on the border line of rejection and that it would have taken very little to have turned the scales against the acceptance of the risk; that the case was a border-line case and if there had been even the slightest indication that there was a possibility of a recurrence the policy would never have been issued and the application would have been rejected; that an extra premium had been charged because the risk was extra hazardous on

account of the physical history; that in issuing a rated up policy the Company considered the risk above normal but that even so the Company relied absolutely upon the showing in the application, particularly upon the absence of any showing of consultation after the treatment by Dr. Wright; and, that had it been otherwise, the policy would not have issued.

Dr. Charles Pius, (Transcript pages 47 to 49) who was a practicing physician and who had performed an autopsy upon deceased, testified that he found no evidence of scar tissue in the stomach or duodenum, and that he would not testify that death had been caused by stomach or duodenal conditions, or had been in anywise related to it.

There was testimony which we will not detail because we consider it immaterial, to the effect that the insured remained in good health up to the time of his death, actively following his occupation of cattle raiser and farmer, and that deceased actually came to his death in an automobile accident wherein his car, which he was driving, collided with a bridge railing, the insured dying shortly thereafter.

It was admitted that prior to the action and after death the plaintiff had attempted to rescind the contract of insurance, and had offered to refund the premiums received by it, with interest thereon, which offer had been refused. (Transcript page 20.)

SPECIFICATION OF ERRORS RELIED UPON AND OF ERRORS IN THE DECREE.

I.

The Court erred in permitting the witness, Dr. Paul Wright, to testify upon cross-examination that he had changed his opinion as to the original diagnosis of peptic ulcer because upon post mortem examination he had found no indication that peptic ulcer had ever existed.

In amplification of this specification we quote the following portion of the record:

> "I was present at a post-mortem examination of Mr. Kasshafer's body after his death.
>
> Q. Now, have you formed any different opinion, after being present at that post-mortem examination, as to your original diagnosis of Mr. Kasshafer?
>
> Mr. Van Dyke. We object to that as immaterial, incompetent, and irrelevant.
>
> The Court. Overruled.
>
> Mr. Van Dyke. Exception.
>
> The Witness. Yes, I have.
>
> The Witness (continuing). The post-mortem was on March 12, 1930, and was held at Yreka in Turner's Undertaking Parlors. Dr. Ray and Dr. Charles Pius were present. The stomach and the duodenum were opened in my presence.
>
> Q. State what you saw or found.
>
> Mr. Van Dyke. We object to any testimony concerning the autopsy or reference to the cause of death. It is immaterial so far as the case of the plaintiff here is concerned.
>
> The Court. Overruled.
>
> Mr. Van Dyke. Exception.
>
> A. They were apparently normal.

Q. Were there any scar tissues such as would follow the result of an ulcer from the stomach, that you saw?

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

The Witness. Not that we could discover. We found no scar tissue in the duodenum at the post-mortem. We could see no results of ulcer in either the stomach or duodenum at that time.

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

The Witness. A peptic ulcer is the destruction of the mucous membrane of either the stomach or intestine. We could find no evidence of either the duodenum or the stomach mucous membrane having been destroyed, previous to the post-mortem."

II.

The Court erred in permitting Dr. Charles Pius to testify on behalf of defendant that in his opinion the condition of the stomach and duodenum were entirely unrelated to the cause of death.

In amplification of this specification we quote the following from the transcript:

"After his death I made a post-mortem examination of his body. I opened his body, opened the duodenum, and made a thorough examination of his interior organs. I opened the stomach and the duodenum. This was all on February 28, 1930.

Q. Now, what did you find as to the interior of the stomach, and his duodenum?

Mr. Van Dyke. We object on the ground that it is immaterial, and is incompetent to prove any-

thing, particularly in view of the fact that so far as the case of the plaintiff is concerned, the cause of death is immaterial.

The Court. Overruled.

Exception noted.

A. There was no evidence of scar tissue in either the stomach or duodenum, and I was very careful to look for it, because there was an old history of ulcer from relatives. I found no evidence whatsoever. I found the other interior organs normal. Everything was normal. The pyloris, that is the muscular ring between the stomach and the duodenum, seemed to be thicker than it should have been, but there was no open lesion, or any sign of disease there.

Q. Now state what you found as to the external injuries which may or may not have caused this man's death.

Mr. Van Dyke. We make the same objection to all this line of testimony, that it is immaterial.

The Court. Overruled.

Exception noted.

A. There was a brownish discoloration under the left jaw; there was a discoloration over the right clavicular; there was a discoloration over the fourth rib at the sternal clavicular articulation; there was an abrasion on the right leg, and a similar abrasion on the lower end of the right leg; the muscles on the left chest wall showed a hemorrhage under the skin into the muscle.

Q. Now, what in your opinion, Doctor, was the cause of this man's death?

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

A. I would say it was vasomotor paralysis, af-

fecting the heart.

Q. State whether or not in your opinion any condition as to his stomach or duodenum in any way related to his death, or caused it.

Mr. Van Dyke. Same objection.

The Court. Overruled.

Exception noted.

The Witness. I would not testify any stomach or duodenal condition has caused his death, or was related to it."

III.

The Court erred in finding:

(a) That plaintiff issued and delivered to Kasshafer its contract and policy of insurance. (Transcript page 56.)

(b) That by reason of said policy it insured the life of Frank Mathew Kasshafer. (Transcript page 56.)

(c) That in making the application, Kasshafer was not guilty of fraud or misrepresentation, or statements made with intent to cheat or deceive the plaintiff into the issuing of the policy. (Transcript page 57.)

(d) That none of the statements made by Kasshafer were knowingly false. (Transcript page 57.)

(e) That the conduct of Kasshafer in applying for and procuring the issuance of the policy was neither false nor fraudulent nor done with the intent to deceive and defraud the plaintiff. (Transcript page 57.)

(f) That the policy was delivered to Kasshafer during his good health. (Transcript page 57.)

(g) That by reason of the death of Kasshafer plaintiff became indebted to defendant in the sum of seventy-five hundred ($7500.00) dollars, together with interest. (Transcript page 59.)

(h) That defendant was entitled to judgment in the sum of seventy-five hundred ($7500.00) dollars, with interest and costs. (Transcript page 60.)

IV.

The Court erred in refusing to incorporate in its decree plaintiff's proposed amendments to the proposed findings of the Court. (Transcript pages 60-63.)

ARGUMENT.

THE LEARNED DISTRICT COURT ERRED IN MAKING ITS FINDINGS AND RENDERING ITS JUDGMENT AGAINST THE PLAINTIFF AND IN FAVOR OF THE DEFENDANT AND IN FAILING TO DECREE AND ESTABLISH THE INVALIDITY OF THE POLICY OF INSURANCE, BECAUSE, FIRST, IT WAS OBTAINED BY A FRAUDULENT MISREPRESENTATION, AND, SECOND, IT WAS VOID FOR BREACH OF EXPRESS WARRANTY BROKEN IN ITS INCEPTION; AND, THE COURT FURTHER ERRED IN REFUSING TO ADOPT FINDINGS PROPOSED BY PLAINTIFF.

We do not believe it necessary to take up seriatim various assignments of error involving the validity of the judgment rendered, denying relief to the plaintiff. We believe that they may all be discussed under a general proposition, that the judgment is against the law and the evidence and entirely unsupported by the record.

It stands as an admitted proposition that Mr. Kasshafer, the insured, gave knowingly false answers to questions propounded to him by the insurer touching the state of his health and his eligibility as an insurable risk, and further that over his signature he solemnly declared that his answers to these questions so propounded to him were correct as written.

Question number seven was as follows: "Have you consulted any physician within the past three years?" To which question the answer was, "Yes," and to that extent it was a correct answer. The following question, dependent upon an affirmative answer of the first, was then asked: "If so give particulars required under question three above." The question numbered "three" to which he was thereby referred required him to give full particulars as to his consultation of any physician within the past three years. Admittedly he failed and refused to give honest answers in that he failed and refused to give full particulars. The examining physician was Dr. Paul Wright and of course the applicant knew that this physician had knowledge that Kasshafer had consulted him within that three year period and received treatment for peptic ulcer. The particulars as to that consultation and as to that treatment were, of course and perforce, given by the insured, but signally the insured confined his statement of particulars as to physicians consulted and treatment received to those particulars which he knew lay within the knowledge of the man before whom he was answering the questionnaire, and Kasshafer stopped short when he had given the information which he knew the examining physician had full and complete knowledge of.

He knew that he had gone to another physician, Dr. Hess, within nine months prior to the time he was making his answers in his application for insurance to the questions propounded to him by the proposed insurer. He knew that he had, himself, consulted with that physician. He knew that he had informed that physician of his prior treatment for peptic ulcer. He knew that he had consulted that physician because he feared a recurrence of that condition. He knew that Dr. Hess, in response to his application for medical advice and aid, had placed him upon a permanent diet planned to avoid a recurrence of ulcer. He knew that he had been since that consultation taking medicine designed to correct a condition conducive to the recurrence of ulcer and it is utterly inconceivable that he did not deliberately and knowingly conceal these facts from the proposed insurer. No man situated as was Kasshafer could have been asked as to physicians consulted by him within three years past and have believed for a moment that he was giving an honest answer, without disclosing the consultation with and continuous treatment by Dr. Hess. What thoughts were in his mind it is, of course, impossible to know, but from the circumstances it is equally impossible to conclude that he did not knowingly conceal from Dr. Wright his consultation with and treatment by Dr. Hess.

Therefore, when he signed the medical examiner's report, he knew that he had not given correct answers and with that knowledge he, nevertheless, warranted the answers to be correct.

Now, the only purpose that Kasshafer had in this matter was to induce the plaintiff here to issue to him a policy of insurance in accordance with his application therefor. That was the sole purpose of the application and of his submission to examination and questioning by the medical examiner for the Company.

The only fair inference from the testimony is that at the very time he appended his signature to that report he was following a diet prescribed by Dr. Hess, after consultation with him, and taking medicines prescribed by that physician. This inference is rendered inescapable in the light of the further testimony that within a few days after he had signed that application and report, he returned to Dr. Hess for further examination and to obtain additional medicines. It was not a matter, therefore, that could possibly have been a mere matter of oversight, but, on the contrary, was a matter uppermost in his mind.

We are not concerned with whether or not he had ever had peptic ulcer, with whether or not he needed treatment of any kind, with whether or not he was mistaken in his own belief that his condition properly warranted consultation with and treatment by a physician. These things were not for him to decide. He was seeking insurance and he undertook to give information touching the state of his health to the insurer and warranted the correctness of that information when he knew it to be false.

This contract of insurance was entered into at Edgewood, California (Exhibit B) and is covered by

the law of that State. Therefore, the following provisions of the Civil Code of California are pertinent:

> "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." (*Civil Code* 2607.)

> "The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitled the other to rescind." (*Civil Code* 2610.)

> "A breach of warranty without fraud * * * broken in its inception prevents the policy from attaching to the risk." (*Civil Code* 2612.)

> "A neglect to communicate that which a party knows, and ought to communicate, is called a concealment." (*Civil Code* 2561.)

> "A concealment, whether intentional or unintentional, entitled the injured party to rescind a contract of insurance." (*Civil Code* 2562.)

> "Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty." (*Civil Code* 2563.)

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." (*Civil Code* 2565.)

> "The completion of the contract of insurance is the time to which a representation must be presumed to refer." (*Civil Code* 2577.)

> "A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations." (*Civil Code* 2579.)
>
> "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this chapter, such right may be exercised at any time previous to the commencement of an action on the contract." (*Civil Code* 2583.)

The following rules of law declared by appellate tribunals in actions for the enforcement or cancellation of policies of insurance are deemed pertinent:

(a) When the materiality of the representations depends upon inferences from facts proved the question is one for the jury, but a different rule applies when the representations are in the form of written answers made to written questions. In such case the parties, by putting and answering the questions have indicated that they deemed the matter material.

McEwen v. New York Life Ins. Co., 23 Cal. App. 699.

(b) "It needs no citation of authority to support the rule that misrepresentation or concealment of the facts relative to the health of the assured are peculiarly fatal to contracts of life insurance because the companies necessarily rely upon the statements and acts of the insured in making contracts."

Layton v. New York Life Ins. Co., 55 Cal. App. 205 (citing:

Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631;

Whitney v. West Coast Life Ins. Co., 177 Cal. 74.)

(c) The fact that the insurer exacted and the applicant gave, a statement as to previous injuries to his eyes or defects of vision proves that the parties considered and agreed that this matter was material. Having so agreed, the fact of its materiality is binding upon them.

> *Westphall v. Metropolitan Life Ins. Co.,* 27 Cal. App. 734;
>
> *Porter v. General Acc. etc. Assur. Corp.,* 30 Cal. App. 204.

(d) A false statement in an application in relation to the last time the applicant was treated by a physician and the disease for which he was last treated was both warranty and a representation material to the risk and if false avoids the policy.

> *Priestly v. Provident Sav. Co.,* 112 Fed. 271.

(e) A presumption of intent to deceive on the part of the applicant is only raised when the statements are made with knowledge of their falsity.

> *Whitney v. Westcoast Life Ins. Co.,* 177 Cal. 80.

We submit that the foregoing statement of facts viewed in the light of the foregoing Code sections and authorities, establish that there was proven in this case, without conflict, both fraudulent misrepresentation entitling the insurer to rescind, and breaches of express warranties preventing the policy from ever having attached to the risk.

It is true that the policy contains a provision that statements made by the insured should, in the absence of fraud, be considered representations and not warranties, but this stipulation does not aid the case of de-

fendant. This is so because, as we have heretofore stated, the statement of insured that he had not consulted any physician antedating his examination and application, except Dr. Paul Wright, was knowingly false and therefore, by law, conclusively presumed to have been made with fraudulent intent to deceive.

Hence, the statement, although sufficient in itself as a representation fraudulently made to entitle the insurer to rescind, goes further and becomes, under the Code declaration above quoted, an express warranty to the effect that no other medical consultation or treatment had been had or received during the three year period, covered by the questions asked, other than that Dr. Paul Wright had been consulted and the treatment delineated received from him.

In this connection it is impressive to note that Dr. Paul Wright, in his confidential report, stated to the company, in respect of that consultation and treatment that he believed the applicant to have entirely recovered from the ulcer of the stomach. (Transcript page 9.)

Under Section 2607 of the California Civil Code, the statement in the application, made by express agreement of the parties a part of the policy, since it was as to a matter relating to the person insured and to the risk, became an express warranty of the truth thereof. And, under Section 2612 of the Civil Code, that warranty broken in its inception prevented the policy from attaching to the risk.

It is, of course, true that contracts of insurance wherever ambiguous or uncertain will be construed

against the insurer, but that rule has no application to the present case. Touching the matters here under consideration, the contract of insurance was plain and easily understood. The question asked was simple and direct. The answer thereto was false and the applicant expressly affirmed it as being true.

As said by the Supreme Court of the United States in *Jeffries v. The Economical Mutual Life Insurance Company,* reported in 89 U. S. 47:

> "The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a case, so far as we can discover, in which law and justice point to the same result, to-wit, the exemption of the company."

Life insurance companies are, after all, not private corporations, but are repositories of the accumulated savings of policy holders. By his application, one seeking insurance requests admission into the great family of policy holders making up the owners of that wealth. The existing reserve of the companies has been built up of the prior contributions of policy holders. The applicant seeking to become a member of that group is asking to obtain the benefits of membership. It is only fair to require of him that if he desires to become such a member, he govern his actions by the rules of simple honesty. And where, as here, it is plainly shown that he departed from those rules knowingly and intentionally, it would be a gross injustice upon the group into which he has so fraudulently gained admission to permit either himself or his beneficiary to reap the fruits of that dishonesty. That group of policy holders have tendered back all

that the common fund received, together with interest. They ask only that the treasure-house they have filled for their protection during life and for the protection of their dependents after their death, be not made the subject of wrongful raid. A company which would permit payment to be made from the property of its insured upon a policy obtained as this one was obtained would be unworthy of the trust and confidence reposed in it by the great family of policy holders whose savings have builded its assets.

Kasshafer knew this policy was fraudulently and dishonestly obtained. Every day that he kept it in his possession after its delivery to him evidenced a continued intention upon his part to carry out and consummate that fraud. Every day that dishonest declaration uttered a renewed indictment against his honesty, and every day of its retention by him constituted a confession of guilt.

We, therefore, submit upon this branch of the case that the learned District Court erred in its refusal to give judgment decreeing the invalidity of that policy.

THE COURT ERRED IN PERMITTING THE WITNESS, DR. PAUL WRIGHT, TO TESTIFY UPON CROSS-EXAMINATION THAT HE HAD CHANGED HIS OPINION AS TO THE ORIGINAL DIAGNOSIS OF PEPTIC ULCER, BECAUSE UPON POST-MORTEM EXAMINATION HE HAD FOUND NO INDICATION THAT PEPTIC ULCER HAD EVER EXISTED.

We have heretofore set forth the portion of the transcript amplifying this specification of error.

Over repeated objections, the overruling of which was repeatedly excepted to, the Court permitted the

defendant to inject into the record testimony upon the point of whether or not Kasshafer had been in fact suffering from peptic ulcer when treated for that ailment by Dr. Paul Wright several years before his application for insurance, and also upon the question of whether or not he at any time had suffered from that ailment.

It was wholly immaterial whether the insured had or had not ever suffered from peptic ulcer. He was clearly called upon to disclose his consultation with Dr. Hess, and the particulars of treatment received by him. Even if it could be said that had the information been given, the policy might still have been issued after further investigation, although such an assumption is directly contrary to the evidence in the case, it still was not for Kasshafer to conceal the information requested and deny to the insurer the opportunity of considering the concealed facts in deciding upon the issuance or nonissuance of the policy.

As declared by the California Civil Code, Section 2565, "materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries," and the fact that the questions and answers were reduced to writing and expressly made a part of the contract, brings the case in its present aspect squarely within the rule declared in *McEwen v. New York Life Ins. Co.*, supra, wherein it is said that where the representations are in the form of written answers to written questions the parties by putting and an-

swering the questions have indicated that they deemed the matter material.

Consequently, we submit the Court erred in permitting the introduction of the testimony objected to.

THE COURT ERRED IN PERMITTING DR. CHARLES PIUS TO TESTIFY ON BEHALF OF THE DEFENDANT THAT IN HIS OPINION THE CONDITION OF THE STOMACH AND DUODENUM WERE ENTIRELY UNRELATED TO THE CAUSE OF DEATH.

We have heretofore given portions of the record in amplification of this specification of error.

As in the case of the testimony of Dr. Paul Wright, the Court permitted testimony by Dr. Pius as to the probable cause of death and as to whether or not it was in anywise due to peptic ulcer, which testimony was objected to upon the ground that it was immaterial as to whether or not peptic ulcer had anything to do with the death.

We need not dwell upon this for it falls under the same classification, and the contention of error is supported by the same authorities as we have heretofore referred to in connection with the specification of error next preceding.

CONCLUSION.

There is no conflict in this record upon any matter material to the issues. The correctness or incorrectness of the decree and of the various findings made in support of it, and of the Court's refusal to adopt the

findings proposed by the plaintiff, are all equally matters of law. There is neither conflict of fact nor a possibility of conflicting inferences to be drawn from the established facts.

It is a case where this Court should not only reverse the judgment of the Court below, but should enter a judgment in favor of the plaintiff, decreeing the invalidity of the contract and the cancellation of the purported policy issued in evidence thereof.

We respectfully ask that the judgment be reversed and that a decree be directed in favor of the plaintiff.

Dated, Sacramento,
September 21, 1931.

BUTLER, VAN DYKE, DESMOND & HARRIS,
Attorneys for Appellant.